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Some Origins of the British North America Act, 1867

by

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Some Origins of "The British North America Act, 1867."

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(Read May Meeting, 1917.)

"The British North America Act, 1867"[1] with its few amending Acts may be called the written Constitution of Canada.

This "Constitution" is of very great consequence indeed in our national life: but it plays by no means the important part played by the Constitution of the United States in that country. It is not so elaborate or minute; it does not affect to exhaust the rules of government, but leaves much to the feeling for freedom and justice supposed to inhere in our people.

The difference between the Americans and us enters into the very terminology:

"The word 'Constitution' carries with it a different connotation in English and American usage, and we in Canada follow the English. In our usage the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed: in American usage the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong no matter how legal it may be; with the American people anything unconstitutional is illegal however right it may be—with the Americans anything which is unconstitutional is illegal, with us to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."[2]

Accordingly when any proposed measure is under consideration, it is very seldom that the Act, the written "Constitution" needs to be looked at.

But as it lays down the broad lines of our system, the Act deserves careful attention: and it is a matter of some interest—it may be of some value—to enquire into its origins.

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[1] 30-31 Vict., C. 3 (Imp.)

[2] The Dodge Lectures, No. 2, Yale University, March 6th, 1917: "The Constitution of Canada." In Bell *v.* Burlington (1915) 34 O.L.R. 619 (Appellate Division of the Supreme Court of Ontario) at p. 622, I discussed this terminology.

The Statute sets out with the statements that:

"The Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom;"

and that "such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire."

Of course these but follow Resolution 3 of the Conference of Delegates at Quebec, October 10th, 1864.

"3. In framing a Constitution for the General Government, the Conference with a view to the perpetuation of our connection with the Mother Country and the promotion of the best interests of the people of these Provinces desire to follow the model of the British Constitution so far as our circumstances will permit."[1] While it is nowhere specifically so enacted, there can be no doubt that the unwritten principles of the British Constitution were intended to govern the new Dominion, and that Canada should have "a Constitution similar in principle to that of the United Kingdom."

This had not always been the case—in the first period of the Constitutional History of Canada, that of French Sovereignty, and in the second, that of military rule (1760-1763), there was nothing of such a Constitution as was enjoyed by the Kingdom of England or of Great Britain.

When in 1763,[2] the King issued his Royal Proclamation and formed the Governments of Quebec, East Florida, West Florida and Grenada, it was stated therein that the Governors would be directed to "summon and call General Assemblies within the said Governments" "by and with the Advice and Consent of our Council": and that the Governors with the consent of the Council and Assembly should make laws and ordinances for the Government. In the Commission[3] to General James Murray as "Captain General and Governor in Chief in and over our Province of Quebec", he was commanded to act "with the advice and consent of the Council and Assembly of our said Province" after these bodies had been formed in accordance with his Instructions. The Instructions[4] directed him to call a

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[1] "Parliamentary Debates on the subject of Confederation.....Printed by Order of the Legislature, Quebec...., 1865." at p. 2.

[2] October 7th, 1763. The Proclamation will be found in Shortt & Doughty's "Documents Relating to the Constitutional History of Canada 1759-1791," (Report Canadian Archives for 1907—Sessional Paper No. 18, 1907) pp. 119 sqq.

[3] Shortt & Doughty, pp. 126 sqq. November 21st, 1763.

[4] Shortt & Doughty, pp. 132, sqq. December 7th, 1763.

Council to be composed of the Lieutenant Governors of Montreal and Trois Rivières, the Chief Justice of the Province, the Surveyor-General of Customs for the Northern District of America (all Imperial appointments) and eight to be chosen by himself from amongst the most considerable of the inhabitants or persons of property of the Province. These were to be approved by His Majesty under His Signet and Sign Manual: and vacancies were to be filled in the same way from persons whose names were to be transmitted by the Governor. As soon as the situation and circumstances of the Colony should permit, he was to call a General Assembly of the Freeholders of the Colony.

It is plain that a "Constitution" not dissimilar to that of the Mother Country was in contemplation; but minute directions were given as to the form of legislation, and the members of the proposed Assembly were prevented from "assuming to themselves Privileges in no ways belonging to them."

For reasons unnecessary here to detail (but well-known) it was thought impracticable to summon an Assembly; and this first proposed "Constitution" fell to the ground. There was some excuse for Thomas Townshend, M.P.[1] saying that the government was in fact despotic.[2]

A new period began when the Quebec Act of 1774[3] came into force (May 1st, 1775)—notwithstanding the vigorous efforts of the Opposition, Townshend, Dunning,[4] Colonel Barré,[5] (who knew for a fact that the principal people of Canada "take a liking to assemblies"

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[1] This was Thomas Townshend, Jr., (1733-1800), son of the Honourable Thomas Townshend, Teller of the Exchequer. He had been Lord of the Treasury in Rockingham's Administration, and Joint Paymaster in the Pitt-Grafton Administration, but resigned in 1768. At the time the speech spoken of in the text was delivered, May 26, 1774, he was in Opposition: he was afterwards Rockingham's War Secretary and Shelburne's Home Secretary and was created Baron (and afterwards Viscount) Sydney.

[2] This language is given in Hansard, Vol. XVII, p. 1357—in another and in some respects a better report the words do not occur: "Debates of the House of Commons in the Year 1774.....drawn up from the Notes of the Right Honourable Sir Henry Cavendish, Bart.,.....London, Ridgway, Piccadilly MDCCCXXXIX."

[3] 14 George III, C. 83. Shortt & Doughty, pp. 401 sqq.

[4] John Dunning (1731-1783) Soliciter-General (1768-1770), was now in opposition: but in 1782, he joined the Ministry as Chancellor of the Duchy of Lancaster, and was created Baron Ashburton. He was a very able lawyer and wrote with clearness and effect: his speeches read well, too.

[5] Colonel Isaac Barré (1726-1802) served under Wolfe at the taking of Quebec where he was dangerously wounded (he is to be seen in West's picture of the Death of Wolfe). He was Vice-Treasurer of Ireland in Lord Chatham's Administration (1766), but most of his life was in Opposition.

and "think they have as good a right to have assemblies as any other colony on the continent")[1] Sergeant Glynn,[2] Charles James Fox[3] (who urged that it was not right for Britain "to originate and establish a constitution in which there is not a spark or semblance of liberty" and protested against the proposal to "establish a perfectly despotic government contrary to the genius and spirit of the British Constitution")[4] and Burke[5] (who objected to the "despotic Council")[6] the Bill was passed. The Attorney-General,[7] thought it absurd that Canada should have her sovereignty divided between the Governor, Council and Assembly; that, he thought, would be making Canada an Allied Kingdom totally out of the power of Britain "to act as a federal union if they please and if they do not please to act as an independent country—a federal condition pretty much the condition of the States of Germany."[8] Sir Guy Carleton, Governor-General of Canada, being examined before a Committee of the House of Commons said that the Canadian inhabitants were not desirous of having Assemblies in the Province—"Certainly not."[9]

The Quebec Act provided for the government of Canada by Governor and Council without Assembly, and the British Constitution was ignored.

But many English-speaking immigrants came in from the United States after the Peace of 1783, and it was decided to divide the Province into two: this was done by Royal Prerogative, but the government and constitution of the two Provinces, Upper Canada and Lower Canada were prescribed by Act of Parliament, the Canada Act or Constitutional Act[10].

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[1] "Debates etc.....Cavendish, etc." See note 2 on p. 73.

[2] John Glynn (1722-1779) Serjeant-at-Law, Recorder of London, described by Lord Chatham as "a most ingenious, solid, pleasing man and the spirit of the Constitution itself."

[3] The well-known politician whose life was in great measure devoted to liberty.

[4] "Debates etc. Cavendish, etc.," pp. 61, 62.

[5] Edmund Burke.

[6] "Debates etc. Cavendish, etc.," p. 93.

[7] Edward Thurlow afterwards Lord Chancellor Thurlow.

[8] "Debates etc. Cavendish, etc.," p. 36.

[9] "Debates, etc. Cavendish, etc.", p. 105. "Very much the Contrary", 17 Hansard, p. 1368.

[10] The division of the Province of Quebec into two provinces, i.e., Upper Canada and Lower Canada, was effected by the Royal Prerogative: but 31, Geo. III., c. 31, the celebrated Quebec Act, provided the form of Government, etc. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158, 28 Hansard, p. 1271. After the passing of the Quebec Act, an Order-in-Council was passed August 24th, 1791 (Ont. Arch. Rep. 19[illegible], pp. 158 *seq.*), dividing the province of Quebec into two provinces and under the

By this time there was a great change in the official view as to the proper form of government for Canada.

In moving for leave to introduce this Bill in the House of Commons Pitt, with almost his first word, said that it was proposed to give the Colonists "all the advantages of the British constitution"[1] In the extraordinary debate on the Bill lasting five days[2], Fox said that the Bill held out to Canadians something like the shadow of the British constitution, but denied them the substance.[3] Burke could not keep away from his bête noire, the French Revolution, and had to be called to order more than once, but he urged that not "the bare imitation of the British constitution" should be given, but "the thing itself."[4] He said that "it was usual in every Colony to form the government as nearly upon the model of the Mother Country as was consistent with the difference of local circumstance."[5] With Fox he urged that the "constitution, deservedly the glory and happiness of those who lived under it, and the model and envy of

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provisions of sec. 48 of the Act directing a Royal warrant to authorize the "Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement" of the effect of the legislation in the new provinces, not later than December 31st, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12th, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation to become effective in the new provinces (see Ont. Arch. Rep. 1906, p. 168). In the absence of Dorchester, General Alured Clarke Lieutenant-Governor of the Province of Quebec, issued, November 18th, 1791, a Proclamation fixing Monday, December 26th, 1791, as the day for the commencement of the said legislature (Ont. Arch. Rep. 1906, pp. 169-171). According technically and in law, the new Provinces were formed by Order-in-Council, August 24th, 1791; but there was no change in administration until December 26th, 1791.

[1] 28 Hansard, p. 1377.

[2] It was in this Debate that the historic rupture took place between Burke and Fox: even in the dry pages of Hansard, the human interest stands out. It is, indeed, hard for us a century and a quarter afterwards, thoroughly to understand the causes of the quarrel; if there was no more than appears on the surface, it is difficult for us moderns to understand why a difference, largely theoretical, of opinion on the French Revolution should cause a severance of friendship. The Debate is reported in 29 Hansard, pp. 103-113: 359-430.

[3] 29 Hansard, p. 110.

[4] 29 Hansard, p. 366: Burke was called to order by the well known Michael Angelo Taylor (afterwards the Father of the House) p. 369, by St. Andrew St. John (afterwards Lord St. John) pp. 370, 374, by Mr. (afterwards Sir) John Anstruther (afterwards Chief Justice of Bengal) p. 371, but Pitt came to his rescue p. 375—then Charles Grey (afterwards the second Earl Grey, Viscount Howick) again called him to order p. 385.

[5] 29 Hansard, p. 403.

the world should be extended.....as far as the local conditions of the Colony.....should admit."[1]

Seventeen years before, the Attorney-General Thurlow had thought it absurd to give Canada a Constitution at all like that of Britain—now every one believed that the Colony should have a Constitution as like that of the Mother Country as possible. Fox thought the new Constitution not democratic enough, but all thought it like that of Britain—as, indeed, it was on paper.

In the House of Lords, Lord Grenville said: "Our Constitution.. ..the envy of every surrounding nation—they are now about to communicate the blessings of the English Constitution to the subjects of Canada because they (i.e., the Lords) were fully convinced that it was the best in the world"—and there was no dissent.[2]

In Upper Canada for example we find when the first Parliament of Upper Canada met at Newark (Niagara-on-the-Lake), Monday, September 17, 1792, His Excellency the Lieutenant-Governor, Colonel John Graves Simcoe, in the Speech from the Throne, said to the members of the Legislative Council and Legislative Assembly:

"I have summoned you together under the authority of an Act of Parliament of Great Britain passed in the last year and which has established the British Constitution, and also the forms which secure and maintain it in this distant country.

"The wisdom and beneficence of our Most Gracious Sovereign and the British Parliament have been eminently proved, not only in the imparting to us the same form of Government, but also in securing the benefit of the many provisions that guard this memorable Act; so that the blessings of our invaluable constitution thus protected and amplified we may hope will be extended to the remotest posterity...."

Both Houses made a most loyal address in answer, that of the Council following closely the wording of the speech from the Throne.

In his Speech from the Throne closing this Session, Simcoe said that the Constitution of the Province was "the very image and transcript of that of Great Britain."[3]

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[1] The words are those of Fox p. 414, but Burke says the same thing in effect.

[2] 29 Hansard, pp. 656, 657.

[3] The Speech from the Throne and the Answers will be found in the Seventh Report of the Bureau of Archives, Ontario, 1910, pp. 1-3; Sixth Report of the Bureau of Archives, Ontario, pp. 2-3. The closing speech is on pages 11 and 18 respectively.

From the very beginning of the two Provinces of Canada it was considered that the Constitution was the "very image and transcript" of that of Great Britain; and most of the conflicts between Governors and Parliament, and between the two Houses of Parliament arose from the contention that the British Constitution was not followed in the government of the Canadas.

Had the unwritten principles of the Constitution of Great Britain been observed in the government of the two Provinces, much of the subsequent trouble would have been avoided; but as we know, they were not. It is not necessary to discuss the conflicts ultimately culminating in the Rebellions of 1837-8—disputes arising in most cases from the Lower House insisting on Responsible Government, the Responsibility to them of the Administration as in the British constitutional practice. Lord Durham in his celebrated Report points out that in all the North American Provinces, there was a striking tendency to a struggle between the Government and the majority, "that the natural state of government in all these Colonies is that of collision between the executive and the representative body"—this he considers us "to indicate a deviation from sound constitutional principles or practice" and looks upon the conduct of the assemblies "as a constant warfare with the executive for the purpose of obtaining the powers inherent in a representative body by the very nature of representative government." Dealing with the system in vogue wherein the Governor claimed that he was in no way responsible to the people's representatives in his administration of the government, Lord Durham says: "The real advisers of the Governor have in fact been the Executive Council; and an institution more singularly calculated for preventing the responsibility of the acts of Government resting on anybody can hardly be imagined": and he adds the pregnant truth "a professedly irresponsible government would be the weakest that could be devised."

He comes to the conclusion that "It needs but to follow consistently the principles of the British constitution and introduce into the Government of these great colonies those wise provisions by which alone the working of the representative system can in any country be rendered harmonious and efficient", and his panacea is "administering the Government on those principles which have been found perfectly efficacious in Great Britain;" he "would not impair a single prerogative of the Crown.....but the Crown must..... submit to the necessary consequences of representative institutions.. It must carry on the Government.....by means of those in whom that representative body has confidence."[1]

Lord John Russell on introducing Resolutions in part based upon Lord Durham's Report, (June 3, 1839) said it was intended to form a union of the Canadas "by which a representative constitution

[1] I employ the useful edition of Lord Durham's Report published by Methuen & Co., London, 1902—the extracts are from pp. 50, 51, 76, 204, 205, 220; the whole Report well repays reading even now.

may be carried into effect ", but he adds: "It does not appear to me that you can subject the Executive Council of Canada to the responsibility which is fairly demanded of the Ministers of the executive power in this country"—the difficulties which he points out are, however, Imperial and not local. He repeated that "It was not wise to lay down as a principle that the Canadian constitution or any colonial constitution should be an exact copy of the British Constitution."[1]

In view of the strong opposition to the Resolutions, they were withdrawn and leave was asked and given to bring in a Bill: this was not pressed to a second reading. But the next year the Bill was again introduced and this time it was passed.[2] It is true that Lord John Russell says, that the Colonial "Assembly put forward claims inconsistent with our monarchical form of government" and is "not of opinion that the official servants of the Governor should be subject to exactly the same responsibility as the Ministers in this country" but he thinks "it will be necessary without any positive enactment (for it would be impossible to introduce such a provision into the Bill), but by the rule of administration which will be established by the Union, that the Assembly should exercise a due control over the officers appointed or kept in office by the Governor, and over the distribution and expenditure of the public funds"—"that the Colonial administration should be made to act in union with the House of Assembly, as the House of Commons in England did with the Government."[3]

Charles Butler who knew more about Canada and its needs than any other in the House said that: "The Union of Canada carried responsible government with it as a natural consequence."[4] William Ewart Gladstone opposed the Bill because he thought "Responsible government meant nothing more than an independent legislature."[5]; John Campbell Colquhoun because: "Responsible government would be incompatible with the maintenance of Colonial Government" and that "the people while they called for responsible government were only anxious to throw off all connexion with British Govern-

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[1] 47 Hansard, 3rd series, pp. 1263, 1268, 1269, 1270, 1287.

[2] The well known Union Act.

[3] 52 Hansard, 3rd Series, pp. 1332, 1333, 1345.

[4] 54 Hansard, 3rd Series, p. 734. Charles Buller was a Liberal politician, a pupil of Thomas Carlyle, graduated at Trinity College Cambridge, became M.P. in 1830, Secretary to Lord Durham when made Governor-General of Canada 1838 and credited with being responsible for much of Durham's Report—a man of high standing and a voluminous writer.

[5] 54 Hansard 3rd Series, p. 743. Gladstone was then a High Tory: Home Rule had not yet entered into his heart to conceive.

ment."[1] The Duke of Wellington entered a protest on the Record of the House of Lords with many reasons (27 in all) the most important being No. 26. "Because the Union . . . , will tend to augment the difficulties attending the administration of the Government, particularly under the circumstances of the encouragement given to effect the establishment in the United Province of a local responsible administration of Government."[2] Lord John Russell at length explained his meaning by saying : "When an Assembly considered that certain institutions and objects would be for the benefit of the country, and . . . . these objects were not incompatible with imperial interests . . it must be the height of folly not to accede to their wishes. . . on the other hand, he never could admit that where the dignity of the Crown was concerned and the interests of the country were involved, any opinion of a Colonial Assembly was to overbear the opinion of the United Parliament."[3]

It is plain from the views of friend and foe that the Bill was expected to give full Responsible Government on the British model in all local, non-imperial, matters.

Some few adjustments had to be made after the Union, but the Bill was fairly effective.

It is not without interest to note that the British North America Act 1867 as originally drafted had as its Preamble: "Whereas the Union of the British North American Colonies for Purposes of Government and Legislation would be attended with great benefits to the Colonies and be conducive to the Interests of the United Kingdom." (Sir) John A. Macdonald (with his own hand) changed this in the second draft (23 January, 1867) so as to read : "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a Federal Union for the purposes of Government and Legislation based on the principles of the British constitution and whereas such Union of the British American Colonies would be attended with great Benefits to the Colonies and be conducive to the Interests of the United Kingdom."[4]

(Consult the Memorandum on p. 97 *infra* for an explanation of the Drafts and Conferences.)

In the third draft (2nd February, 1867), it reads:

"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a Federal Union under

[1] 54 Hansard 3rd Series, p. 745. Colquhoun was a miscellaneous writer of no great importance. He was M.P. 1832-47.

[2] 55 Hansard 3rd Series, p. 666.

[3] 54 Hansard 3rd Series, p. 751.

[4] See Sir Joseph Pope's "Confederation". Toronto, The Carewell Co., 1895. Inset at beginning of volume, pp. 140, 158, 177, 212, 248.

the British Crown for the purposes of government and legislation, based upon the principles of the British Constitution." The fourth draft has the same words: and, it was not until the Revise of 9th February, that the Preamble appears as in the Act passed.

It seems to me that the amendment made by Macdonald was so made to show that the Union was the act of the Colonies themselves not a gift, good or bad, of the Imperial authorities: the Preamble as finally settled indicates the two cardinal principles, which have characterized Canada from the beginning: the fixed determination to remain a part of the British Empire and the equally fixed determination to govern herself. This is true Canadianism.

The decision to have a Federal and not a Legislative Union as suggested by Lord Durham[1] was come to at a very early stage of the Quebec Conference: all the Delegates from Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland agreed in this decision.

The Preamble to the British North America Act proceeds: "It is expedient that provision be made for the eventual admission into the Union of other parts of British North America."

The Union of all British North America had been many times recommended—perhaps, the most notable of the recommendations was that of William Smith, Chief Justice of Quebec, in a letter to Lord Dorchester[2].

Lord Durham had also suggested a "Legislative Union over all the British Provinces in North America. A general and responsible Government. . . a general Legislative Union" which "would elevate and gratify the hopes of able and aspiring men."[3] Many others of more or less note had made the same suggestion: and even at Charlottetown at the first Conference and at Quebec at the second, it had been hoped that Prince Edward Island and Newfoundland would come into the Union.

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[1] "On my first arrival in Canada, I was strongly inclined to a federal union. .....I thought that it would be the tendency of a federation.....gradually to become a complete legislative union...." But he changed his mind. "I believe that tranquillity can only be restored by subjecting the Province to the vigorous rule of an English majority; and that the only efficacious government would be that formed by a legislative union." Report, pp. 226, 227. It cannot be said that the Union of the Canadas was a failure; but undoubtedly the present Federal Union is preferable—in any case a Legislative Union could not have been formed.

[2] See Can. Arch. Q 44, 1, p. 61: Kingsford's Hist. Can., Vol. VII, pp. 310-312. A very full account will be found in the Life of William Smith in Dr. Anson Phelps Stokes' Yale University Volumes.

[3] "Report" pp. 229 (the word "Legislative" is here misprinted "Legislature") 231.

In 1865, and again in 1866, Prince Edward Island by her Legislature in emphatic terms refused to enter into the proposed Union; Newfoundland also declined. Canada, New Brunswick and Nova Scotia sent delegates to England for the necessary legislation by the Imperial Parliament. Prince Edward Island was again invited to join and its representative, the Premier[1], then in London, was favourably impressed with the terms offered; but on his return home, his government was defeated. The entry of Prince Edward Island into the Union was not effected until 1873.

Section 3 authorizes the formation of a "Dominion under the name of Canada." The "Quebec Resolutions" speak of a "Federal Union": the name "Kingdom of Canada" appeared in an early draft of the Act, but "Dominion" was substituted for "Kingdom" by the Foreign Secretary, Lord Stanley, from regard to the supposed Republican susceptibilities of the United States. The fear that the United States would object to the style "Kingdom" was so far as is known wholly baseless and it is not too much to say, it was absurd[2].

Section 5.—"Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia and New Brunswick." The names Upper Canada, Lower Canada, Nova Scotia and New Brunswick are found in the Rough Draft of Conference, and the first and second Draft of the Act, but in the third Draft appear the names as at present.[3]

The provisions as to Executive Power call for no particular remark — they simply systematize and formulate constitutional practice.

Section 17—"There shall be one Parliament for Canada, consisting of the Queen, an Upper House called the Senate and the House of Commons."

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[1] The Premier was Hon. James C. Pope, afterwards a Member of Sir John Macdonald's Administration.

Delegates from both Prince Edward Island and Newfoundland attended and took an active part in the Quebec Conference. The Government of Prince Edward Island declined to accept the proposed terms. The Government of Newfoundland would have accepted them, but could not carry the people.

[2] In the "Rough Draft of Conference" at London, the name is left blank; in the first Draft of the Bill "such name as His Majesty thinks fit": in the third "Kingdom of Canada"; as also in the fourth. In the Revise Draft of 9th February appears "One Dominion under the name of Canada." Pope, "Confederation," pp. 123, 142, 159, 160, 181, 213.

[3] Pope "Confederation," pp. 123, 142, 159, 160. "Quebec" was the name of the "Government" constituted by the Royal Proclamation of 1763 including the present Quebec, Ontario and a great deal more: Ontario is of course named from the Great Lake: New Brunswick was separated from Nova Scotia in 1784.

At a very early stage of the Quebec Conference the Resolution was unanimously adopted: "That there shall be a General Legislature for the Federated Provinces composed of a Legislative Council and Legislative Assembly"—this terminology was not persisted in, as we find Hon. George Brown within a week thereafter speaking of the "House of Commons" and on the revision of the Resolutions the language employed in the Report of the Delegates was "a Legislative Council and a House of Commons." The Upper House continued to be called the Legislative Council; but by the third Draft of the Act,[1] "Senate" was given as a name to the Upper Chamber to distinguish it from the Legislative Councils of the Provinces as well as to give it greater dignity.

The name "House of Commons" involved a principle. From the very beginning of Colonial Government the Assemblies had more or less vigorously claimed the same rights and powers as the Imperial House of Commons.

When Murray received instructions to call a General Assembly, he was told that "the Members of several Assemblies in the Plantations have assumed to themselves Privileges in no ways belonging to them, especially of being protected from Suits at Law during the term. . . And some Assemblies have presumed to adjourn themselves at Pleasure without leave from our Governor first obtained, and others have taken upon them the sole framing of Money Bills refusing to let the Council alter or amend the same."—and he was instructed to prevent such practices.[2] No Assembly was in fact called under these instructions: disappearing under the Quebec Act of 1774, the Assembly reappears under the Canada or Constitutional Act of 1791—and thereafter continuously the Assemblies kept pressing their claim to be Houses of Commons: not infrequently using the name. The Union Act of 1840 still used the name Assembly: but by 1867, there was no longer any doubt of the true position of the popular House, and it received its true name. It was left to the Canadian Parliament to define its own "privileges, immunities and powers" so long as these did not exceed those of the House of Commons at Westminster.

When the very small part played in Canadian public life by the Senate is considered, it is interesting to see what a large part of the time of the Quebec Conference was taken up in the question of the composition etc., of the Upper Chamber. It was quite early decided to form Divisions for the purpose of the Upper House: 1. Upper

[1] Pope, "Confederation," pp. 10, 19, 20, 39, 123, 142, 160.
[2] Shortt & Doughty, Const. Docs., 1759-1791, pp. 136, 137.

Canada, 2. Lower Canada, 3. Nova Scotia, New Brunswick and Prince Edward Island—these three Divisions to have an equal representation of 24 each, and to the Island of Newfoundland additional representation was to be allotted: but much difference of opinion arose as to the manner of selecting them. Some were in favour of electing the members, some of allowing each Division to choose its own method; but at length all agreed that the Members of the first Upper Chamber should "be appointed by the Crown at the recommendation of the Federal Executive Government upon the nomination of the respective Local Governments, due regard being had to the claims of . . the opposition in each Province so that all political parties be as nearly as possible equally represented"—and to be nominated from the existing Legislative Councils if possible.[1]

Prince Edward Island withdrew and Nova Scotia and New Brunswick took the 24 Senators allotted to the Maritime Division, 12 to each. The first draft of the bill proposed to name the members, but the third and subsequent drafts left it open to appoint any person. An understanding, however, had been reached as to who should be appointed.

The Legislative Councils in Upper and Lower Canada had been appointive as the Council was in United Canada till the Act of 1856, which made it elective.[2] Sir John Macdonald at the Quebec Conference, while he did not admit that the elective principle had been a failure in Canada, thought they should return to the original principle; no one seems to have contested the proposition and the nominative system was unanimously approved.[3] No one suggested that the position of Member of the House should be hereditary: the power in that regard given by the Act of 1791 early disappeared from our Constitution, never having been acted upon.[4]

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[1] Pope, "Confederation", pp. 12, 13, 14 (Oct. 17th, 1864) 18, 58, 64-66, 100, 143.
[2] 19-20 Vic. C. 140 (Can.)
[3] Pope, "Confederation," p. 58.
[4] (1791) 31 George III C. 31 S. 6. ".....Whenever His Majesty, His Heirs or Successors shall think fit to confer upon any subject....by Letters Patent under the Great Seal of either of the said Provinces, any Hereditary Title of Honour, Rank or Dignity of such Province descendible.....it shall...be lawful for His Majesty, etc., etc., to annex thereto.....an Hereditary Right of being summoned to the Legislative Council of such Province...." Fox objected to this (29 Hansard, p. 107) "It seemed to him peculiarly absurd to introduce hereditary honours to America, where those artificial distinctions stunk in the nostrils of the natives." Pitt (do. p. 112) thought "An aristocratical principle being one part of our mixed government....it was proper that there should be such a Council as was provided by this Bill and which might answer to that part of the British constitution which composed the other House of Parliament." Fox (do. p. 411) thought the Councillors should be elected (p. 113) that "in the Province of Canada, the introduction of

Section 26 gives power to the Governor General, when the Queen should on his recommendation think fit to direct that three or six Members should be added to the Senate, to add the said number of Members accordingly.

This provision appears for the first time in the third draft of the Bill, which in Sec. 16 provides that if the Council reject a Money Bill of the Commons or reject three times any other Bill, then if the Bill has been carried by a majority of votes from two of the three Divisions, Her Majesty might add Members to the Senate, observing the equality between the three Divisions. Of course this was by analogy to the House of Lords, and was intended to meet local factious opposition. In the fourth draft it was provided that on the application of the Government of Canada Her Majesty in Council might sanction an appointment of additional Members not exceeding 18, and in the fifth draft the clause appeared as in the Act.

The tenure of office for life was early proposed by (Sir) John A. Macdonald and the proposition does not seem to have met opposition.[1] This had been the tenure in Upper and Lower Canada and in United Canada till 1856.[2]

Section 34 gives the Governor General, i.e., the Government, the power to appoint the Speaker of the Senate—this is by analogy to the Lord Chancellor at Westminster; the like provision appears in the Canada Act of 1791[3] and the Union Act of 1840.[4]

Sec. 36 provides that the Speaker may vote and that on an equality of vote, the decision is deemed to be in the negative—this also comes from the House of Lords. It was agreed at the Quebec Conference that the Speaker should have no vote except a casting vote, but this was changed to the present rule in the third draft of the Bill.[5]

In the Act of 1791, it was provided that the Speaker of the Council (or Assembly) should have a casting voice "in all cases where the voices shall be equal"[6] in the Union Act of 1840 the Speaker of

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nobility was peculiary improper." but Pitt (p. 415) "laid great stress on the circumstance of the hereditary honours being derived from the imperial crown of Great Britain which he considered as a matter of peculiar value": and the Section passed—to remain a dead letter.

[1] Pope, "Confederation," pp. 162, 184, 217.

[2] Pope, "Confederation," p. 14.

[3] (1791) 31 George III, C. 31, S. 12.

[4] (1840) 3 and 4 Vict., C. 35, S. 9 (Imp.).

[5] Pope, "Confederation," pp. 41, 100, 126, 146, 163 (The third Draft is "The Speaker shall vote as other Members, etc.") 185 (the fourth draft is equally peremptory) 219 (Final Draft same as at present) 255.

[6] (1791) 31 George III, C. 31, S. 28.

Council had no vote except when the voices were equal; in that case, he had the casting vote.[1]

Section 35 provides that the quorum in the Senate shall be at least 15 including the Speaker.

In the Instructions to General Murray, 1763, he was commanded to have a Council of 12, of whom 5 should form a quorum.[2] the Acts of 1774 and 1791 are silent on this matter and consequently, as at the Common Law, the quorum was a bare majority. The Union Act provided that 10 including the Speaker must be present.[3]

As was to be expected, the quorum was not fixed at the Quebec Conference: the number is blank but is fixed at 15 in the first draft and so continued.[4]

Section 37 provides for the number of Members of the House of Commons:

Ontario	
Quebec	82
Nova Scotia	65
New Brunswick	19
	15
In all	181

At the Quebec Conference on motion of Hon. George Brown it was resolved "that the basis of representation in the House of Commons shall be by population as determined by the official census every ten years; and that the number of Members at first shall be 200.

Upper Canada	
Lower Canada	89
Nova Scotia	65
New Brunswick	19
Newfoundland	15
Prince Edward Island	7
	5

that.....Lower Canada shall always be assigned 65 Members ....."All the delegates agreed but those of Prince Edward Island—Mr. Haveland saying "Prince Edward Island would rather be out of the Confederation than consent to this motion. We should have no status." Both he, Mr. Palmer, and Mr. Whelan considered that they were in no wise bound by an understanding arrived at at the Charlottetown Conference that the representation was to be by population: Col. J. H. Gray and Mr. Coles, their col-

[1] (1840) 3 and 4 Vict., C. 35, S. 10 (Imp.)
[2] Shortt & Doughty, p. 133.
[3] (1840) 4 and 4 Vict., C. 35, S. 10 (Imp.).
[4] Pope, "Confederation," pp. 126, 146, 163, 185, 219, 255.

leagues, thought they came to the Quebec conference on that understanding, but the majority stood out against the proposition. Mr. Shea, of Newfoundland, pertinently said "What brought about the conference except the difficulties in Canada over the question of representation by population?"[1]

At the time of the Union in 1841, Lower Canada had a population of about 630,000; Upper Canada of about 470,000; but the two parts of United Canada were given an equal number of representatives in the House of Assembly. The Lower Canadians complained of the inequality and justly so—the provision complained of arose from Lord Durham's view that it was necessary to unite the two races on such terms as that the English would be given the domination. He said, "without effecting the change so rapidly or so roughly as to shock the feelings or to trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English law and language in this Province, and to trust its government to none but a decidedly English Legislature."

As has been elsewhere said:—

"The Upper Province rapidly increased in wealth and population, overtaking and passing the Lower Province by 1850; and many of its public men complained of the provision, formerly favourable to their section, that each part should have the same number of representatives. Representation by Population—"Rep. by Pop.," as it was generally called—became the watchword of the Reform party in Upper Canada.

"As early as 1858 a responsible Minister of the Crown in Canada, Mr. (afterwards Sir) Alexander T. Galt, openly advocated it and moved for the appointment of a committee to ascertain the views of the people of the Lower Provinces and of the Imperial Government. In 1861 Sir John A. Macdonald, while opposing the principle of Rep. by Pop., said that the only feasible scheme as a remedy for the evils complained of was a Confederation of all the Provinces. And at length in 1864 he effected an agreement and a coalition with his strongest political foe, Mr. George Brown, to secure this object.

"The Lower Provinces had in the Session of their respective Parliaments in 1864 authorised the appointment of delegates to discuss and if possible to bring about a Union of the Maritime Provinces, i.e., New Brunswick, Nova Scotia and Prince Edward Island. A meeting of these delegates had been set for September 1, 1864. The Canadians felt that it would be advisable to take advantage of this opportunity;

[1] Pope, "Confederation," pp. 19, 68, 69, 70.

and accordingly eight Members of the Coalition Government of both sides of politics, went to Charlottetown, Prince Edward Island, met the Conference and were asked to and did express their views. The Maritime delegates are understood to have come to the conclusion that a union on the larger basis might be effected. In order that the feasibility of such a Confederation might be discussed and considered from every point of view, the Charlottetown Conference was adjourned; and it was agreed to hold another Conference at Quebec, to be attended by delegates from all the Provinces interested. This Conference met in the Parliament buildings, Quebec, October 10, 1864, and was attended by delegates from Canada, New Brunswick, Nova Scotia and Prince Edward Island; resolutions were adopted which formed the basis of the British North America Act subsequently passed, which established the Dominion of Canada."[1]

It was quite beyond question to have Representation other than by Population and so the Quebec Conference decided; certain of the delegates from Prince Edward Island thought their Province had not been fairly treated in the representation in the Upper House, but gave way. In respect of the representation in the Lower House, however, it was said "our people would not be content to give up their present benefits for the representation of five Members." "But," added the speaker "if the Government who found the delegation will take the responsibility on them I may support them."[2] As we know, the Government of the Island refused to assent to the terms: but she came in a little later with the same number (5) of Members of the House of Commons.

Sections 45 to 49 as to the election, duty, power &c., &c., of the Speaker of the House of Commons are from the practice of the Imperial House of Commons.

No instructions were given on this subject to General Murray in 1763; of course the Act of 1774 did not contemplate a Lower House at all. The Act of 1791 is silent as to the method of election of the Speaker of the Assembly and in fact he was elected by the House, the statute giving him a casting vote when the voices were equal: the

[1] The quotations are from the Dodge Lectures, Yale University, March, 1917. In respect of "Rep. by Pop.," it may be of interest to quote the late Dr. Henry Scadding. In his erudite and very interesting "Erratic Locepta" (*Canadian Journal* for May, 1864) he says, p. 14. "In the political arena we see if we do not hear, Rep. by pop." and in a note adds: "To the 'foreign' reader it may be necessary to say that a certain dangerous reef running right across the lake of Canadian politics is thus named. The full form of the appellature is Representation by population—" and a dangerous reef it was for Dr. Scadding's political party.

[2] Pope, "Confederation," pp. 70, 71. (Hon. Edward Wheelan, M.P.P.).

Union Act provided for his election by the Members of the Assembly and gave him a casting vote when the voices should be equal.[1]

This matter was not discussed at the Conference, no reference to it is found in the Report of the Delegates but the practice was so taken for granted that it does not appear in the Regulations at Westminster, 4th December, 1866. The Rough Draft, however, and all subsequent drafts are explicit.[2]

Section 48 makes twenty, including the speaker, a quorum of the House of Commons.

In the Assembly proposed by the Royal Proclamation of 1763, there was no provision for a quorum—nor in the Act of 1791. As a fact the quorum was fixed, from time to time, by the Assembly itself; the Union Act fixed 20 (including the Speaker), as the quorum.[3]

The quorum was left blank "exclusive of the Speaker" in the Rough Draft, but is fixed at 20, including the Speaker in the third Draft.[4]

Section 50 prescribes five years as the maximum life of a House of Commons. Murray's Commission (1763) authorized him "When and so often as need shall require to summon and call General Assemblies"[5] thereby leaving the term in his discretion: the Act of 1791 fixed four years as the maximum,[6] and in this regard was followed by the Union Act.[7]

When the Constitutional Act of 1791 was introduced, it contained a provision for a septennial Assembly. Fox indignantly said that: "Why they should make such Assemblies not annual or triennial, but septennial was beyond his comprehension. . . . By a septennial bill the people of Canada might be deprived of many of the few representatives that were allowed by this bill. . . . It might be inconvenient for such persons to attend. . for the term of seven years," although "they might be able to give their attendance for one or even for three years without any danger or inconvenience to their commercial concerns."

Pitt thought "a house of assembly for seven years would surely be better than one for a shorter period," but gave no reasons. The point seems (with many others) to have been lost sight of in the extraordinary quarrel between Fox and Burke; it is not mentioned again

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[1] (1840) 3 and 4 Vict., C. 35, SS 33-34 (Imp.)
[2] Pope, "Confederation," pp. 128, etc.
[3] (1840) 3 and 4 Vict., C. 35, S. 34.
[4] Pope "Confederation," pp. 128, 166, etc.
[5] Shortt & Doughty, p. 128.
[6] (1791) 31 George III, C. 31, S. 27.
[7] (1840) 3 and 4 Vict., C. 35, S. 31 (Imp.)

and it does not appear at what stage the quadrennial term was substituted.[1]

The matter passed *sub silentio* in 1840. At the Quebec Conference (Sir) John A. Macdonald moved that the Legislative Assembly should continue for five years—and this was unanimously agreed to. Accordingly the maximum appears in the Report of the Delegates and in all the Drafts[2].

Section 53. "Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons."

This is but the formal statement in statutory form of the constitutional principle long recognized in the Mother Country that all grants of money, and all taxation shall be made by the representatives of the people *i.e.*, the House of Commons.[3]

Murray had in 1763 received definite and specific instructions not to allow the Assemblies intended to be called by him to take "upon them the sole framing of Money Bills, refusing to let the Council alter or amend the same;" the King added: "It is . . . Our further pleasure that the Council shall have the like power of framing Money Bills as the Assembly."[4]

Neither in the Constitutional Act of 1791, nor in the Union Act of 1840 was there any such prohibition; nor was there any Statutory provision as in the B. N. A. Act in which it is inserted apparently *ex abundanti cautela*.

There was little or no discussion in the matter at the Conference, the rule being taken for granted. Mr. (afterwards Sir) Oliver Mowat moved "All bills for appropriating any part, &c." (as in the Section)—there was no opposition and the Section passed unanimously.[5]

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[1] 29 Hansard, pp. 106, 112.

[2] Pope, "Confederation," pp. 20, 43, 102, 128, 165, 189, 223, 258.

[3] It is not without interest to note that Charles James Fox objected to the Quebec Act of 1774 (amongst other reasons) because the clause in the Act providing for the accustomed dues of the Roman Catholic clergy was a money measure, and it should not have originated in the House of Lords (as this Bill did); he urged that to allow the Bill to pass would be "in fact, a relinquishment of the annual and hitherto undoubled right of the House of Commons to originate Money Bills." He asked that the journals of the House of Commons of March 5th, 1677 should be read: "And the same being read accordingly, it appeared that they had rejected a Bill from the Lords for the purpose of collecting customary tythes and other dues" for the reason that the Bill should have originated in the House of Commons, 17 Hansard, pp. 1362, 1399.

[4] Shortt & Doughty, pp. 136, 137.

[5] Pope, "Confederation," pp. 31, 48, 87, 88, 135, 148, 166, 189, 224, 259.

Section 55 reads: "Where a bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure."

Section 56. "Where the Governor-General assents to a bill in the Queen's name, he shall, by the first convenient opportunity, send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification."

Section 57. "A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies by speech or message to each of the Houses of Parliament or by proclamation that it has received the assent of the Queen in Council."

In Murray's Instructions (1763), it was provided that no law or ordinance respecting private property should be passed without a clause suspending its operation till His Majesty's pleasure should be known: and also that all "Laws, statutes and ordinances" passed by Governor, Council and Assembly should be transmitted within three months of their passing to the "Commissioners for Trade and Plantations" with the reason for passing them. Until such time as an Assembly should be called, Rules and Regulations not affecting "Life, Limb or Liberty of the Subject" or "imposing any Duties or Taxes" might be passed by Governor and Council, but must be transmitted to His Majesty by the first opportunity for approbation or disallowance.[1] No Assembly having been in fact called, the Governor by the advice of the Council made a number of Ordinances.[2]

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[1] Shortt & Doughty, pp. 135, 136.

[2] These are now to be found collected in a convenient form in a publication of the Archives of Canada. "Ordinance made and passed by the Governor and Council of the Province of Quebec, 1763-1791, Ottawa....., 1917."

Before the coming into force, May 1st, 1775, of the Quebec Act, 1774, there were 39 Ordinances in all passed by the Governor at Quebec: on their face, they purported to be "ordained and declared" (or "ordained" in a few instances) by the

The Quebec Act of 1774 provided that every Ordinance should be transmitted to His Majesty within six months of its passing for the Royal approbation, and that if disallowed it should cease to have effect from the promulgation at Quebec of His Majesty's Disallowance—no ordinance could be made without the consent of the Governor.[1]

In the Constitutional Act of 1791, the provisions are substantially as at present;[2] and also in the Union Act of 1840.[3]

On motion of Mr. Mowat, the Delegates at Quebec, unanimously passed the following Resolutions:

"8. Any bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent . . .

"9. Any bill passed by the General Legislature shall be subject to disallowance by Her Majesty within two years as in the case of bills passed by the said Provinces hitherto. . . ."

These appear in the same form in the Report of the Delegates, and in the Resolutions of the Conference as Westminster, but in the Rough Draft the present form makes its appearance in substance.[4]

Section 58 Provides for the appointment of a Lieutenant-Governor for each Province by the Governor-General in Council.

At the time of the Conquest of Quebec, there were three administrative Districts in the eastern part of Canada: Quebec, Montreal and Three Rivers. Amherst, in 1760, appointed Brigadier-General Gage Lieutenant Governor of Montreal and dependencies, Colonel Burton, Lieutenant-Governor of Three Rivers and dependencies. Monckton had the previous year before his departure from the Colony appointed General James Murray, Governor of Quebec and Col. Burton, Lieutenant-Governor, and when Amherst took command, Murray continued to act as Governor of Quebec.

When the time came for civil government to be established, it was decided to continue the division into three districts, but to make Quebec the residence of the Governor-in-Chief. It was decided to

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Governor "by and with the advice and assistance of His Majesty's Council", or "by and with the advice and consent of His Majesty's Council."—sometimes "Council of the same", or "Council of this Province" is used instead of "His Majesty's Council."

[1] Shortt and Doughty, p. 405.

[2] (1791) 31 George III, C. 31, SS. 30, 31, Shortt & Doughty, p. 701.

[3] (1840) 3 and 4 Vict., C. 35, SS. 37, 38, 39 (Imp.). The "practice of returning colonial laws for their approval in England goes back to the days when Virginia and Bermuda were governed by chartered commercial companies.....By the end of the 17th Century the routine of transmitting acts for the Royal approval had become fairly well established. "The Royal Disallowance in Massachusetts" 24 Queen's Quarterly, pp. 338 sqq., by A. G. Dorland.

[4] Pope, "Confederation," pp. 31, 48, 87, 88, 107, 129, 149, 166, 189, 224, 260.

appoint Murray as "Captain General and Governor-in-Chief": by his Commission he was commanded to administer the prescribed oaths "to the Lieutenant-Governors of Montreal and Trois Rivières" and by his instructions to call to his Council (amongst others) the "persons whom we have appointed to be our Lieutenant Governors of Montreal and Trois Rivières."[1]

After the Constitutional Act of 1791, a Governor-General was appointed for all Canada and a Lieutenant-Governor for each Province who had during the absence from his Province of the Governor-General (substantially) all the powers of the Governor-General—this Governor-General was also from and after 1786 Governor of the Maritime Provinces each of which had its own Lieutenant-Governor with the same powers as a Lieutenant-Governor of Upper or Lower Canada. In the Canadas this arrangement came to an end on the coming into force in 1841 of the Union Act, but it continued in the Maritime Provinces until Confederation. All these appointments rested with the Home Administration, and the B.N.A. Act was a departure from the existing practice.

Section 69. "There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario."

Section 71. "There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec."

Section 88. "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act."

We have seen that until 1792, there were not two Houses of Parliament in Canada, that the Constitutional Act of 1791 provided for a double chamber and that this continued under the Union Act of 1840, and was in force at the time of Confederation. Nova Scotia and New Brunswick also had two chambers.[2]

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[1] Shortt & Doughty pp. 127, 133. There were also officers sometimes called Lieutenant Governors, but more usually Governors of "Detroit and its dependencies" and of Michillimackinack. By the time the Proclamation of 1763 had become effective (August 1764), Col. Burton had succeeded Gen. Gage in Montreal and had himself been succeeded in Three Rivers by Col. Fred. Haldimand, by himself for a time and by Col. Fred. Haldimand again.

[2] Nova Scotia still has two Chambers as has Quebec: all the other Provinces have one Chamber only. It may be convenient to set out here the course of constitutional development.

Manitoba was organized in 1870 with two Chambers, but she abolished her Legislative Council in 1876 by 39 Vict. C. 18 (Man.).

At the Quebec Conference the Hon. George Brown moved: "That in the Local Government there shall be but one Legislative Chamber"; Mr. (afterwards Sir Leonard) Tilley of New Brunswick objected as did Mr. Fisher and Mr. Chandler of the same Province; Mr. (afterwards Sir Charles) Tupper of Nova Scotia was inclined to agree with Mr. Brown, and Mr. Carter of Newfoundland told of the favourable experience of his Province with one Chamber. The motion, however, was for a time withdrawn. When it was brought up again, Mr. McCully of Nova Scotia made the sensible suggestion to "let Upper Canada try a single Chamber and if it succeeds the other Provinces can afterwards adopt it": and this was carried. It was not until the third draft that the express provisions for the number of Chambers were formulated.[1]

The minute division of legislative authority between Dominion and Provinces formed in Sections 91 and 92 was the subject of a considerable amount of discussion—only two matters seem to call for special comment.

By Section 91 (27) the Dominion is given legislative power in Criminal Law: by Section 92 (13) the Provinces, in Property and Civil Rights in the Province—these two provisions indicate the fundamental causes of the Federal system being adopted in the Constitution of the Dominion instead of a Legislative Union.

When civil government was provided for Canada instead of military rule by the Royal Proclamation of 1763, it was ordered that "public Justice within Our said" Colony in "all Causes as well Criminal as Civil" should be administ d "as near as may be agreeable to the Laws of England." With the English Criminal Law there never was any complaint in French Canada; but there was much feeling against the English Civil Law: and this had no little to do with the passing of the Quebec Act of 1774. Carleton advised "as the only way of doing

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British Columbia had one House called the Legislative Council: in anticipation of coming into Confederation, she changed the name to the Legislative Assembly in 1871 by the Act 1871, 34 Vict., No. 147 (B.C.).

When the Provinces of Alberta and Saskatchewan were created by the Dominion Acts of 1905, 4 and 5 Edward VII, CC. 3 and 42, it was provided that their Legislature should have only one Chamber called the Legislative Assembly. New Brunswick got rid of her Legislative Council by the Act of 1891, 54 Vict., C. 9 (N.B.) becoming effective in 1892.

Prince Edward Island had two Houses until the Act of (1893), 56 Vict., C. 1 (P. E. I.) became effective the following year—thereafter one Counciller and one Assembly man were to be elected for each electoral district, but all to sit and vote in one House, the Legislative Assembly (reminding the student of constitutional history of the ancient Scottish Parliament).

[1] Pope, Confederation, pp. 21, 75, 175.

justice and giving satisfaction to the Canadians, which is to continue the laws of England with respect to criminal matters, but to revive the whole body of the French laws which were in use there before the Conquest with respect to civil matters."[1]

This suggestion was adopted by the Government of the day: and the Bill contained provisions to that effect. In the House of Commons, there was much opposition to the reintroduction of the French civil law. Townshend said it deprived "many British-born subjects . . . of the dearest birth-rights of Britons." Dunning asked "Where is the Englishman who would not fall into an agony if he understood that he was to be deprived of" the English law? Mr. Mackworth moved that a clause should be introduced "that in all trials relating to property and civil rights where the value shall exceed a certain sum either of the parties may demand a trial by jury constituted according to the laws of England."

In the result, however, the Government carried their Bill in which as Lord North said "there were the fewest inconveniences, the civil law of France being left to the Canadians", but the criminal law remaining unchanged.[2]

The Act as passed provided "that in all matters of controversy relative to Property and Civil Rights, resort shall be had to the Laws of Canada as the Rule for the Decision of the same." But considering "the certainty and lenity of the Criminal Law of England and the benefits and advantages resulting from the use of it," it was continued in full force.[3]

The agitation against the Quebec Act continued as fierce for long after as before its enactment; but the immigration of the United Empire Loyalists induced the Mother Country to form two Provinces instead of one, and this in turn abolished the French Canadian law in a large part of Canada. These immigrants had been accustomed to English law: and it was thought well to divide the Colony and to give each section the right to determine for itself the system of law under which it would live. The Constitutional Act effected this: and by the first Act of its first Parliament, Upper Canada enacted that "in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as the rule for the decision of the same"; the second Act provided for trial by jury.[4]

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[1] Shortt & Doughty, pp. 121, 128, 150, 252, 258.

[2] 17 Hansard pp. 1358, 1359, 1360, 1361, 1394.

[3] Shortt & Doughty, p. 404.

[4] (1792) 32, George III, C. 1, S. 3 (U.C.): (1792) 32 George III, C. 2, S. 1 (U.C.).

Thereafter even after the Legislative Union in 1841, the two Provinces remained different in their laws in respect of "property and civil rights", Upper Canada being a Common Law, Lower Canada, a Civil Law country.

But the Province of Lower Canada did not abolish the English Criminal law: accordingly the two Provinces had (substantially) the same criminal law.

Therefore when a division came to be made between Dominion and Provinces in respect of Legislative Power, it naturally followed that the Dominion would take the subject of Criminal Law and the Province that of Property and Civil Rights.

Section 133. "Either the English or the French language may be used by any person in the debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

"The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages." In the articles of Capitulation of Montreal there was nothing said as to the French language and the demand that the Canadians should continue to be governed according to La Coutume de Paris was refused. But of course the French language continued to be used except amongst the English newcomers. Proclamations, ordinances etc., were printed in both English and French. Neither the Proclamation of 1763 nor the Acts of 1774 and 1791 made any provision for language or made any change in the practice.[1]

In Upper Canada, all proceedings of every kind were after the organization of the Province, in English, but provision was early made for the French language being used in writs as against "a Canadian subject by treaty or the son or daughter of such Canadian subject."[2]

When Lord Durham made his investigations resulting in the Union, he reported "I entertain no doubt as to the national character which must be given to Lower Canada; it must be that of the British Empire; that of the majority of the population of British America; that of the great race which must in the lapse of no long period of time be predominant over the whole North American continent. Without effecting the change so rapidly or so roughly as to shock the feelings

[1] Shortt & Doughty, pp. 8, 18, 27, Art. XLII, 401, sqq, 694 sqq.
[2] (1794) 34 George III, C. 2, S. 9 (U.C.).

and trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population with English laws and language in this Province and to trust its government to none but a de' 'edly English Legislature."[1]

In the Union Act there was inserted a provision that "all Writs, Proclamation, Instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada, and for proroguing and dissolving the same and all Writs of Summons and Election and all Writs and public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly or either of them and all Returns to such Writs and Instruments, and all Journals, Entries and written or printed Proccedings of what nature soever of the said Legislative Council and Legislative Assembly and of each of them respectively and all written or private Proceedings and Reports of Committees of the said Legislative Council and Legislative Assembly respectively shall be in the English language only: Provided always that this Enactment shall not be construed to prevent translated copies of any such Document being made but no such copy shall be kept among the Records of the Legislative Council or Legislative Assembly or be deemed in any case to have the force of an original Document."[2]

Vigorously opposed as was the Act in both Houses of Parliament, no exception seems to have been taken to this clause.

But the French Canadian people never submitted to this proscription of their language; their leaders on both sides agitated against it both in the Canadian Parliament and out of it. At length, in 1848, the Imperial Parliament repealed the obnoxious section.[3] Thereafter the French language received due consideration in the Canadian Parliament.

No discrimination against its use in the new Dominion was ever contemplated. At the Quebec Conference, it was moved by Mr. (afterwards Sir) A. T. Galt and unanimously agreed to "that in the General Legislature and in its proceedings, the English and French languages may be both especially employed. And also in the Local Legislature of Lower Canada and in the Federal and Local Courts of Lower Canada." This with a change making it read "Federal Courts and in the Local Courts" appeared in the Report of the Delegates, and the Resolution of Westminster, with an immaterial

[1] "Report etc.," p. 212: this has already been quoted in another connection.

[2] (1840) 3 and 4 Vict., C. 35, S. 41 (Imp.)

[3] (1848) 11 and 12 Vict., C. 56, S. 1 (Imp.). The *Canada Gazette* appeared in both languages as early as 1844.

change in terminology in the Rough Draft; in the first Draft it is enlarged so as to authorize the use of either language in the Debates of the House of Parliament and the Local Legislature of Lower Canada, the Records and Journals of these Houses and "by any person or in any Pleading or Process or in issuing from any Court of the United Colony or in or from all or any of the Provincial Courts of Lower Canada." (Sir) John A. Macdonald queried this provision "Qu? whether as to Courts of the United Colony this should not be confined to such of those Courts as sit in Lower Canada."

The third Draft makes it obligatory to use both languages in the Records and Journals of the Parliament of Canada and of Lower Canada; the fourth Draft provides that the Statutes of Canada and of Quebec shall be printed in both languages in separate volumes; the final Draft follows the third and the Act as passed is the same in substance.[1]

MEMORANDUM.

In considering the Conferences, leading upon to Confederation and the forms assumed by the proposed legislation, it should be borne in mind:—

There was in 1864, a Conference at Charlottetown of Delegates from Nova Scotia, New Brunswick and Prince Edward Island at which Delegates from Canada made their appearance, but nothing was there decided except to hold another Conference at Quebec.

The Quebec Conference was held October 1864, attended by Delegates from Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, resulting in a Report of the Delegates. The proceedings at this Conference so far as available will be found in the volume mentioned in Note 4 p. 79 supra, at pp. 1–88; the Report of Delegates pp. 38–52.

Prince Edward Island and Newfoundland standing aloof, Delegates from Canada, Nova Scotia and New Brunswick in 1866, met at the Westminster Palace Hotel, London, and had a Conference, the Proceedings of which are given in outline pp. 94–97, pp. 111–122, and their Resolutions pp. 98–110.

A Rough Draft of the proposed Bill was then drawn up, pp. 123–140; the first Draft then followed, Jan. 23rd, 1867, pp. 141–157; a second Jan. 30th; a third February 2nd, pp. 158-176; a fourth pp. 177-211; a final Draft Feb. 9th pp. 212–247; the Act as passed pp. 248-293.

[1] Pope, "Confederation," pp. 33, 48, 107, 135, 156, 175, 243, 279.